

June 9, 2009

Utah Constitutional Revision Commission
Utah State Capitol Complex
Housing Building, Suite W210
P.O. Box 145210
Salt Lake City, UT 84114

Re: Proposed Constitutional Amendment – Post-Conviction Remedies

Dear Members of the Utah Constitutional Revision Commission:

Thank you for your recent letter requesting that interested parties submit written information to the CRC regarding the proposed constitutional amendment restricting judicial post-conviction review of criminal cases. I would like to participate in the public hearings on this topic as the Commission proceeds to study it in the coming months. In the meantime, here are some written comments in response to your request, specifically, with respect to questions 1, 2 & 3.

(1) Purpose for a Constitutional Amendment:

I am not convinced that a constitutional amendment is necessary to address the concerns raised by the proponents of this measure. Potential alterations to the Post-Conviction Remedies Act (PCRA) itself and to the applicable rules of procedure should be considered before resorting to the drastic remedy of a constitutional change. A number of us are exploring such possibilities through a study group assembled by Attorney General Mark Shurtleff that consists of supporters and opponents of the proposed amendment. Mark Field may be in the best position to describe the current status of this part of our discussion. It is quite possible that a combination of (a) statutory amendments, (b) alterations to the applicable procedural rules, and (c) educational programs for the judiciary about the multifaceted implications of its rulings in this area of law could alleviate some of the problems alleged by advocates of S.J.R. 14.

(2) Relationship Between S.J.R. 14 and Other Constitutional Provisions:

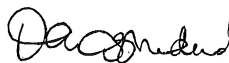
The relationship between S.J.R. 14 and other state constitutional provisions (most notably, Article 1, Section 5) is uncertain. On the one hand, the amendment could be interpreted to mean that the legislature may eliminate state habeas corpus in the post-conviction realm. Habeas corpus has historically not been utilized to address issues of factual innocence, but rather to rectify constitutional and procedural injustices. Nothing in the amendment unambiguously forestalls the legislature from ridding the state of any post-conviction "cause of action" grounded in habeas corpus. On the other hand, the phrase "Notwithstanding any other provision of the Constitution," which was contained in a recent version of S.J.R. 14, could be construed to demand that the writ of habeas corpus may not be suspended—that the proposed amendment would “co-exist” with the suspension clause, so to speak. But what precisely does that mean? Could the legislature repeal the PCRA and leave only a nebulous common law writ of habeas corpus? If so, what form would that take? In the past, proponents of S.J.R. 14 have asserted that the common law writ of habeas corpus traditionally applied only to pretrial, not post-conviction, detention and that Article I, Section 5 refers to that form of habeas corpus. That is not entirely clear; at the time of the Utah Constitution's ratification in the late nineteenth century, habeas

corpus was understood by the Utah courts to have more than pretrial effect and that, to some extent, it had quasi-appellate traits. Accordingly, the precise relationship between S.J.R. 14 and Article 1, Section 5 is unclear and might ultimately give rise to confusion, not to mention protracted litigation.

(3) Relationship with the Federal Courts

Although proponents of S.J.R. 14 might foresee some positive effects on the relationship with federal courts if the amendment were to pass, there are also some drawbacks. Specifically, if the legislature were to limit post-conviction review dramatically in the aftermath of this amendment, which it would largely be permitted to do, the federal courts might usurp the power of the Utah judiciary in certain regards. That is, in state criminal cases, federal courts typically only become involved when a federal habeas corpus petition is filed after the exhaustion of state court remedies. Ordinarily, federal courts afford tremendous deference to state court judgments in these proceedings. But, in the absence of a full and fair state post-conviction proceeding, the defendant could receive de novo review in federal court; there would be no presumption of correctness, or deference, extended to the proceedings. Therefore, if the federal courts were to interpret future state revisions to the PCRA as the denial of such a full and fair opportunity to be heard, Utah state criminal defendants could conceivably obtain reversals in federal court more readily than is the case at present, a result at odds with our conception of and desire for state sovereignty. I do not intend to suggest that the legislature would actually restrict post-conviction remedies to the degree that it will engender this type of federal response—only that it would have the capacity to do so and that the judiciary would, in essence, be unable to prevent it.¹

Sincerely,



Daniel S. Medwed
Associate Professor of Law

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I should note that one commendable feature of the proposed amendment is that it would safeguard post-conviction claims based on factual innocence, among other claims, from legislative elimination.